Briefing Paper 8.29

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Consultation on Immigration Appeals

In Briefing Paper 8.28 on this website I summarised some of the main features of the governments recently published Draft (Partial) Immigration and Citizenship Bill and appended a copy of the submissions made by Migration Watch to the Home Affairs Committee of the House of Commons. The draft is described as partial because some important topics have been omitted, with the intention of adding them later so that a complete Bill can be laid before Parliament in the next session. The government has now issued a consultation paper on proposed changes to the immigration appeals system, one of the omitted topics. For a summary of how the present system, introduced in April 2005, works, you are referred to our briefing paper 8.2. (Please note that the reference in paragraph 2 of that paper to the Immigration and Nationality Department of the Home Office should now be read as a reference to the UK Border Agency, the new name of the former Department.) The content of our submissions is inevitably technical in places, but the subject is important. Asylum and immigration appeals are appeals to the Asylum and Immigration Tribunal against decisions of the UK Border Agency which are adverse to the applicant. Appeals are heard by some hundreds of immigration judges at hearing centres in London, Birmingham, Manchester, Glasgow and other major cities. The most recent figures available show that between April 2007 and March 2008 the Tribunal disposed of over 165,000 appeals.

Following is the text of the submissions we have now made to the UK Border Agency. You will note that we are particularly concerned about the proposed return to a two tiered system of appeals, not very different from the previous system which was abolished only three years ago in favour of the single tier Asylum and Immigration Tribunal a Tribunal which the governments consultation paper acknowledges as having been a success. We are concerned also that although responsibility for the appeals system rests with the Ministry of Justice, the consultation paper is issued by the UK Border Agency, part of the Home Office. Lord Justice Richards of the Court of Appeal was co-chairman of the committee which produced the paper, along with Lin Homer, Chief Executive of the UK Border Agency. There is no indication that anyone with experience of the working of the old system or indeed the Ministry of Justice itself made any contribution to the committees deliberations. The main motivation behind the proposed changes appears to be that of reducing the present workload on High Court and Appeal Court judges.* In our view the primary concern of the government should be the speedy, fair and efficient disposal of asylum and immigration appeals, not the convenience of the judges. In any event, it is unlikely that the governments proposals, if implemented, would mean a substantial reduction in the judges workload.

*This workload arises because under sections 103A and 103B of the Nationality, Immigration and Asylum Act 2002 application can be made firstly to the High Court, by a party aggrieved by a determination of the Tribunal on the ground that the Tribunal made an error of law, for an order requiring the Tribunal to reconsider its decision. If the determination has been reconsidered following such an order, section 103B provides for an application to the Court if Appeal or equivalent courts in Scotland and Northern Ireland. Such an application may be only on a point of law and may be made only with the permission of the Tribunal or of the appellate court in question.

CONSULTATION ON IMMIGRATION APPEALS

Comments by Migration Watch UK
(Text of our submissions to the UK Border Agency)

1 I have written this paper on behalf of Migration Watch UK in response to the UK Border Agencys consultation paper on immigration appeals published on 21 August 2008. Migration Watch is a well established and respected non-political organisation which since 2002 has monitored all aspects of immigration into the UK, including asylum, and has made representations to the government and other interested bodies on the subject. The scale and reach of our activities can be appreciated from perusal of our active website. I was a part time immigration adjudicator for 10 years between 1992 and 2002, following which I joined Migration Watch as its Honorary Legal Adviser.

2 The immigration appeals system has been the responsibility of the Ministry of Justice and its predecessors since 1987. We note that the consultation on reform so far has been undertaken by a working group chaired by Lord Justice Richards and Ms Lin Homer. It seems clear that the UK Border Agency has the upper hand in this matter. The Agency has issued the consultation paper and its foreword has been signed by the Minister of State for Borders and Immigration. The paper is not so meticulously written as one might expect when the subject is the present state of the law and proposals for major changes to it. There are sketchy references to the 2002 Act, which as amended contains all the provisions on the present immigration appeals system. Although paragraph 5 says that the appeals working group included senior judiciary with considerable experience of immigration matters there is nothing in the paper which would indicate that the members of the working group were aware of the earlier two tier system or of its shortcomings.

3 When I was an adjudicator the two tier system of appeals was operating. Adjudicators heard appeals against Home Office decisions and their own determinations could be appealed, with leave, to the Immigration Appeal Tribunal (IAT). The IAT could and often did remit any appeal for rehearing by a different adjudicator, sometimes more than once. From the IAT there was a further possible appeal, also with leave, to the Court of Appeal or corresponding courts in Scotland or Northern Ireland. Occasionally appeals reached the House of Lords. Separate from this was the possibility of judicial review, most often invoked against refusals of leave to appeal against the adjudicators determination. This protracted appellate process often lasted for years and greatly extended the period during which it was not lawfully possible to deport the unsuccessful appellant. There was an unanswerable case for reducing the number of levels of appeal and the single tier Asylum and Immigration Tribunal (AIT) was created by the 2004 Act and came into being in April 2005. To quote paragraph 2 of the consultation paper, The new Tribunal has been a success. There remain reservations about the degree of the AITs success, but broadly we agree with that statement. **That being the case, we view with dismay the proposal to go back to a**

two tier system, albeit very differently constituted from the original two tier system.

4 The starting point for the proposal is the Tribunals, Courts and Enforcement Act 2007, which seeks to establish a unified structure bringing together all national tribunals dealing with a multitude of different specialised jurisdictions which have hitherto operated separately. The structure will have two tiers, a First Tier Tribunal and an Upper Tribunal. It is now proposed that this structure shall be made to fit asylum appeals, with the upper tier appeals being heard either within the proposed administrative appeals chamber or within a specialised chamber of the Upper Tribunal. (Consultation paper paragraph 22.)

5 Paragraph 9 of the consultation paper draws attention to the possibilities under the existing legislation, the 2002 Act as amended by the 2004 Act, of further remedies available to the parties following a determination by the AIT. Section 103A provides for an application to the High Court or corresponding courts in Scotland and Northern Ireland on the ground that the AIT made an error of law, for an order requiring the AIT to reconsider its decision on the appeal. Section 103A also contains the very important restriction that an order for reconsideration may be made only once in respect of a particular appeal.. Section 103B provides for a second stage, an appeal on a point of law to the appropriate appellate court. If the High Court on an application under section 103A thinks that the appeal raises a question of law of major importance, it may refer the appeal to the appropriate appellate court. By transitional arrangements the jurisdiction of the High Court under section 103A has been exercised by the AIT itself, to ease the burden of reconsideration applications on the High Court. The jurisdiction is in practice exercised by senior immigration judges. This was intended to be a temporary measure, but the volume of work is such that there is no foreseeable prospect that the temporary arrangement will ever cease. The main theme of the consultation paper is that the higher courts have an excessive burden of immigration cases and that ways must be found of reducing the burden by transferring them to a specialist tribunal. Hence the proposal to set up a new two tier system under the provisions of the 2007 Act

6 Paragraph 20 of the consultative paper envisages that the existing main workload of the AIT will be taken over by a new first tier chamber. Paragraphs 21 and 22 envisage that the Upper Tribunal would potentially have to deal with a similar volume of appeals to the present number of reconsiderations heard by the AIT . A broad pool of judiciary would be able to sit in the Upper Tribunal to hear the appeals including High Court judges, Senior Immigration Judges. It is not explained why the Upper Tribunal should exercise full appellate jurisdiction instead of hearing applications for reconsideration, which if successful result in a reference back to the AIT.

7 The end result of these proposals is that we revert to a two tier appellate system. The whole objective of the sections on the appellate structure in the 2002 Act was to abolish the old IAT and have a new AIT as a single tier of appeal, with very restricted rights of appellants to contest the AITs determinations. The only material differences between the old IAT and the proposed Upper Tribunal are (1) that the Upper Tribunal will have a more high powered panel of judges and presumably no lay members,(which the IAT always had) and (2) it will be a superior court of record. (2) means that the Tribunals decisions will not, for the most part, be subject to judicial review. This sounds like a good idea, but I recall that in the 1990s there was much discussion about reforming the appellate system, and one idea which was floated at the time was that the IAT, perhaps in some improved form, should become a superior court of record. The government of the day evidently thought otherwise, and a good thing too.

8 The paragraphs in the consultation paper under the heading Statutory appeals confirm my

misgivings that the intention is very largely to reinvent the old two tier system. I note in paragraph 30 discussion as to whether applications for permission to appeal should always be dealt with on paper or whether there should be a right to a permission hearing. Permission hearings would be a very bad idea and would be used by appellants simply to spin out the proceedings. In my recollection, the IAT invariably dealt with applications for leave on paper, disposed of by a single member. If by some misfortune we are to be saddled with a new two tier system, there should be no question of allowing permission hearings.

9 I note from paragraph 31 that the outcome of most appeals would be a substantive decision by the Upper Tribunal. However, paragraph 32 suggests that in order to avoid imposing an excessive workload on the Upper Tribunal it should have the power to remit appeals to the First tier Tribunal without substantive reconsideration. This is going back to the bad old days with a vengeance. The IAT made a regular practice of remitting appeals for rehearing rather than disposing of them itself. This was partly because of the way appeals were listed, so that only half an hour was allowed for the hearing of each, and partly because of laziness. Clearly remitting for some luckless adjudicator to rehear the appeal was a much less onerous way of dealing with an appeal than giving it full consideration and allowing or dismissing it. It was not unknown for the IAT to remit the same appeal several times over. Remittals were a major factor delaying the ultimate disposal of appeals.

10 The main concern of the working group appears to have been to produce proposals for reform which would reduce the burden of immigration cases on the High Court and Court of Appeal, but in so doing they have put forward ideas which run the risk of producing all over again the shortcomings, the multiplicity of appeals at different levels and the long delays which discredited the old appeals system. It was the same aim of reducing the excessive load of immigration cases on the higher courts which led to the governments attempts when what is now the 2004 Act was going through Parliament to include an ouster of jurisdiction clause which would have largely barred resort to the higher courts. This was a highly controversial matter and the government was eventually forced to back down under parliamentary pressure. The provisions for reconsideration of AIT decisions which now appear as sections 103A-E of the 2002 Act were the less objectionable alternative.

11 The other concern of the working group appears to have been to fit the system of asylum and immigration appeals into the new two tier structure created by the 2007 Act. This is a one size fits all approach which we do not believe is satisfactory. The present system has been functioning for only three years and whatever its shortcomings may be, it is a great improvement on the previous system. One important aspect of the present system is contained in section 103A of the 2004 Act, which gives power to the High Court to review decisions of the AIT on grounds of an error of law. The High Court can order the Tribunal to reconsider its decision if it thinks that the Tribunal may have made an error of law, **but, as noted in paragraph 5 above, by subsection (2)(b) may make such an order only once in relation to an appeal.** This is an important limitation, not acknowledged in the consultation paper, which makes no mention in its proposals of including anything similar. We can see no justification for changing the system so soon. We consider that instead of starting all over again with a complete revision of the system the government should be seeking ways to make modest improvements, if it is felt that any are needed, leaving the main structure untouched.

Judicial review

12 We note from paragraphs 37-40 of the consultation paper that if the pattern of the 2007 Act is followed the Upper Tribunal will have power to exercise a judicial review jurisdiction if certain conditions are met. As we do not favour a two tier tribunal we do not agree with this recommendation. However, if a two tier tribunal were to be established, we accept that this might be a good idea, in that it should relieve the Administrative Court of a considerable burden of judicial review applications. As against this, the proposed Upper Tribunal would be largely composed of High Court judges and senior immigration judges. (So savings of judicial manpower in the Administrative Court might well be counterbalanced by the need to appoint High Court judges to the Upper Tribunal.) However, according to paragraph 23 of the consultation paper, the Upper Tribunal would be a superior court of record and its decisions would therefore not be subject to judicial review, except in the most exceptional circumstances, though what those circumstances might be is not explained. As noted in paragraph 3 above, under the previous two tier system, most applications for judicial review were against decisions of the IAT to refuse leave to appeal against an adjudicators determination. If there is to be a new two tier system, the question arises whether the exclusion of judicial review of the Upper Tribunals decisions extends to refusals of permission to appeal against the decisions of the First Tier Tribunal. If the Upper Tribunal itself has a judicial review jurisdiction, presumably that would not extend to reviewing its own decision to refuse such permission, in which case the Administrative Court would have to accept the burden. This is a matter which needs clarifying.

Summary of conclusions on the consultation paper

The Government welcomes the working groups recommendations and believes that these proposals will deliver:

An appeals system which is **faster** bringing appeals to a conclusion sooner;
An appeals system which is **final** where good decisions are made which are not litigated over in the higher courts;
An appeals system which is **respected** a Tribunal structure that is recognised as fair, expert and efficient.

We do not share any of these optimistic expectations. On the basis of many years of previous experience a two tier system, with all the paraphernalia of permission hearings, remittals and possible judicial reviews which the consultation paper envisages, must inevitably take much **longer** in bringing appeals to a conclusion than the present single tier system. As for **finality,** the consultation paper floats the idea of conferring on the Upper Tribunal the status of a court of record, so as to eliminate judicial reviews, but concedes that such reviews may still be possible in exceptional cases without explaining what those cases might be. I have drawn attention to the likelihood of history repeating itself if permission is required for an appeal to the Upper Tribunal, in which case appellants will be able to resort to judicial review of refusal of permission and will do so in large numbers. As regards **respect**, no one has suggested that there is any lack of it for the present system. If the consultation papers proposals become law, they will result in much greater delays in the disposal of asylum and immigration appeals and lead to a considerable **diminution of respect** for the appeals system. A subsidiary reason for moving to a single tier appeal system was that the former IAT was not respected by adjudicators whose determinations were frequently set aside in cavalier fashion. One of the Presidents of the IAT, Sir Andrew Collins, publicly admitted at the time when he took over the office that the Tribunal was not held in high regard. That was something of an understatement. There is every danger that the reversion to a two tier

system will result in the new Upper Tribunal rapidly acquiring a similar standing.

14 Paragraph 2 of the consultation paper describes the AIT as a success, with some justification, but fails to explain convincingly why it should now be replaced with a more cumbersome and slower structure. Paragraph 2 gives statistics showing how the AIT has improved the disposal rate of appeals over that achieved by the previous two tier system. It is not made clear just how the proposed new Tribunal will improve on that rate. There is an old maxim that if the machine isnt broke, dont try to mend it and we suggest that the government ought to reflect seriously on this. It seems clear from the general tenor of the paper that the main objective is to relieve the workload on the judges of the High Court and Court of Appeal, and this objective seems to be regarded as more important than the efficient, fair and speedy disposal of appeals. With all due respect to the judges, they may find the burden of immigration cases excessive, but it is an important part of the job they are paid to do. I do not in any case believe that the governments proposals would reduce their workload, particularly if some of them have to be members of the Upper Tribunal and there is still an appreciable volume of judicial review cases, as envisaged in paragraph 13 above.

Inquisitorial proceedings

15 This is a subject not raised by the consultation paper, but we nevertheless believe that it is important and should be dealt with in the new Bill. The following two paragraphs repeat identical paragraphs from our submissions to the Home Affairs Committee of the House of Commons and the UK Border Agency on the draft Immigration and Citizenship Bill generally.

16 We believe strongly that the procedure in hearing asylum and immigration appeals should in future be inquisitorial rather than adversarial and that this should be clarified by an explicit provision in the draft Bill. Up to now the view taken by the higher courts has always been that immigration judges should act in similar fashion to judges in civil litigation and simply hold the ring between the parties. They should refrain from asking questions themselves other than to the extent necessary for clarifying the evidence. They should not on any account descend into the arena and start cross examining appellants or other witnesses. There have often been times when the Home Office has been short of Presenting Officers and has not been represented at appeal hearings. The result is that on such occasions there is no one to cross examine the witnesses and in view of the readiness of so many appellants to resort to untruthful evidence, this is a serious deficiency.

17 The object of asylum and immigration appeals is very different from that of civil litigation. In the latter the judge should properly remain aloof and simply pass judgment on the basis of evidence and legal submissions. But these appeals are concerned with the rights and duties of individuals as against the state and the obligations of the United Kingdom towards foreign nationals who wish to visit, settle, claim asylum or whatever and in large measure to enjoy the same state benefits as its citizens. The immigration judge should be concerned to elicit the truth in proceedings before him, having regard to the public interest in every appeal. Migration Watch made a similar statement in proceedings before the House of Commons Constitutional Affairs Committee in 2003 and 2004. (See Second Report of the Session 2003-04, Volume II, page 60.) In our view this Bill is an opportunity to make this significant improvement to the system.

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4 September, 2008